IN THE HIGH COURT OF GUJARAT
AHMEDABAD

SECOND APPEAL NO. 15 OF 1996

Date of Decision:19th February,1996

For Approval and Signature:

Hon'ble Mr. Justice : S.D. SHAH

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substant..

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question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Darji Jethalal Hirji and Others ..... Appellants

vs.

Sakarben Kanji Darji and others ..... respondents

MR. S.M. Shah, Advocate for appellant

Coram: S.D. SHAH, J.
Date :19th February ,1996

C.A.V. JUDGMENT:

1. The appellants before this Court are the heirs and legal representatives of deceased defendant. The respondents are the original plaintiffs. A parcel of land belonged to one deceased Darji Murarji Devji and he executed a deed of mortgage with possession of the said property. After his death, his heirs and legal representatives being the present plaintiffs instituted a Regular Civil Suit No. 44 of 1971 in the Court of Civil Judge, J.D., Bhuj for redemption of mortgage and for possession of the suit property. The mortgage was executed in favour of Darji Hirji, who is now being represented by his heirs and legal representatives as defendants. It appears that based on the pleadings of the parties, the trial court after recording evidence, dismissed the suit of the plaintiffs initially vide judgment and order dated 24th of November, 1972 holding that the suit was premature. Being aggrieved thereby, the respondent plaintiff filed Regular Civil Appeal No. 153 of 1972 in the District Court at Bhuj which was allowed and preliminary decree of redemption of mortgage was passed in favour of the plaintiffs. The defendants thereupon preferred Second Appeal in the High Court of Gujarat being Second Appeal No. 459 of 1975 which was also dismissed on 17.9.84. Against the said judgment and decree of the Gujarat High Court, the defendants also preferred Appeal before the Hon'ble Supreme Court of India being Civil Appeal No. 3132 of 1985 which also came to be dismissed on 30.9.1991. It is thus clear that the preliminary decree which was passed in favour of the respondent by the Assistant Judge of Kachchh, came to be confirmed by the highest Court of the country. Under the preliminary decree, the plaintiffs were required to deposit the mortgage amount of Rs. 1,133.34 ps in the Court and the amount of kharajat which was required to be fixed by leading evidence in the suit.

2. The plaintiffs thereupon deposited the mortgage amount of Rs.1,133.50 ps in the court and prayed for drawing of final decree. In such application which was given by the plaintiffs, the defendants filed their reply at Exhibit 29, inter alia, contending that they have spent amount of Rs. 8,000/- on the property upto 25th June, 1971 which should be paid to them and that they have also repaired the suit property and made it habitable after fitting doors, windows, flooring, etc and that they have spent further amount of Rs. 40,000/which should be paid to them. They further insisted that kharajat should be fixed and the amounts should be paid.

The trial court thereupon permitted the parties to lead evidence and after raising necessary points for determination, recorded the findings that the defendants have only spent amount of Rs. 1,200/- as kharajat and the plaintiffs were entitled to get final decree under Order 34 Rule 8 of the Civil Procedure Code and it therefore directed that the final decree to be drawn by judgment and order dated 4th of August, 1993. The trial court directed the plaintiffs to deposit the mortgage amount of Rs. 1,133.50 ps as well as the amount of kharajat being Rs. 1,200/- as fixed by the trial court vide its order dated 4th of August, 1993 and final decree was thereupon ordered to be drawn under Order 34 Rule 8 of the C.P. Code.

3. The final decree which is drawn also recited that the mortgage amount was fully deposited by the plaintiffs on 26th November, 1984 and thereupon it was directed that the defendants should re-transfer the property in the name of the plaintiffs and should execute a receipt acknowledging the payment of the mortgage amount. The plaintiffs were also directed to produce before the court all documents relating to the mortgage. The plaintiffs were also directed to deposit the amount of Rs. 1,200/- being the amount of kharajat. Such amount is also deposited by the plaintiffs.

4. It is against such final decree which is drawn by the trial court whereby the amount of kharajat is for the first time fixed and the plaintiffs are directed to make the payment of amount of kharajat, the defendants have preferred Regular Civil Appeal No. 43 of 1993 in the Court of District Judge, Kachchh at Bhuj. The learned District Judge at Bhuj has vide judgment and decree dated 5th of January, 1996 dismissed the appeal. Being aggrieved by such confirming judgment and decree, the appellants have preferred this Second Appeal. In the memo of Appeal following three substantial questions of law are formulated, which according to the appellants, arise for the consideration of the Court.

(i) Whether the final decree proceedings are time barred?

(ii) Whether the Appellants were tenants when mortgage was made and therefore whether the Appellants are protected under the Rent Act?

(iii) Whether the proceedings of final decree were liable to be remanded as the Trial

Court has not decided the issue of limitation despite the direction of this Hon'ble Court in Civil Revision Application No. 811 of 1993?

5. At the admissional hearing of this Second Appeal, Mr. S.M. Shah, learned Counsel appearing for the appellants has mainly urged and pressed the first question as a substantial question of law which arises in this Second Appeal. In his submission, the proceedings initiated for drawing of a Final Decree under order 34 of the Code of Civil Procedure were barred by limitation and that therefore no final decree could have been drawn by the trial court and confirmed by the lower appellate court. At this stage, it is required to be noted that a deed of usufructuary mortgage relating to the suit house was executed by the deceased father of the plaintiffs in favour of deceased father of the defendants. In the suit instituted by the plaintiffs for redemption of the mortgage, a preliminary decree was passed by the learned Assistant Judge, Kuchchh at Bhuj in Appeal No.153 of 1972. The said decree passed by the Assistant Judge, Kuchchh at Bhuj was confirmed by the High Court in the Second Appeal No. 459 of 1975. The matter was further carried to the Supreme Court and such decree was confirmed by the Supreme court in the year 1984. It is thus clear that a preliminary decree for redemption of mortgage which was passed, was subject matter of challenge upto the Supreme Court till 1984. However, it is not clear as to whether such decree was stayed or not. It is after confirmation of decree by the High Court that the plaintiffs have deposited the mortgage amount as directed by the Court vide receipt at Mark 78/1 and having deposited the amount, they applied for final decree by making application at Exhibit 77 on 4th of February, 1985. It is against such application for drawal of final decree that the defendants have objections and their main contention was that the application made by the plaintiffs for drawing of final decree, was barred by limitation as the period for depositing the mortgage amount as directed by the preliminary decree had expired and that thereafter no final decree could be drawn. Their contention was that the matter was governed by Article 137 of the Limitation Act, 1963 which is equivalent to Article 181 of the old Limitation Act. At this stage, it is useful to refer to Article 137 of the Limitation Act of 1963 which runs as under:

137	Any other application for which no period	Three years	When the right to apply

of limitation is provided elsewhere in this Division (1905-Art.151)	} } } }	} accrues. } }

7. From the aforesaid provisions of the Article it becomes clear that in cases where no period of limitation is prescribed, the application has to be filed within three years. The period of three years for an application for a final decree runs from the date of the decree of the appellate court and not from the date fixed for payment in the preliminary decree. It was submitted before this Court that since the preliminary decree was passed by the Court of Assistant Judge in Appeal as back as 29th of July, 1975, the plaintiffs should have deposited the amount of mortgage money and should not have waited till the Supreme Court finally decided the Civil Appeal and uphold the preliminary decree.

8. In fact, it is not very clear from the record of this Court as well as from the record of the trial court as to whether the drawing of the final decree was stayed at any stage by the High Court or by the Supreme Court. In absence of this material, it shall have to be assumed that since appeal is continuation of the suit and since the preliminary decree was not finally upheld till the Hon'ble Supreme Court decided the Civil Appeal against the defendants, the plaintiffs could not have complied with the preliminary decree. Even otherwise, the preliminary decree stipulated the payment of kharajat by the plaintiffs to be fixed by the court at the time of drawing the final decree and since the amount of kharajat was never fixed, the plaintiffs could not have deposited the amount of mortgage money as well as kharajat. However, Mr. S.M.Shah, learned Counsel appearing for the appellants has placed strong reliance upon the decision of the Bombay High Court in the case of VASUDEV VISHNU v. GOPAL PARASHRAM KULKARNI reported in AIR 1919 Bom. page 53. In the case before the Bombay High Court, the court was dealing with Article 181 of the Limitation Act of 1908. There the application for extension of time to pay mortgage money was granted. On default, it was directed that the mortgaged property to be put to sale. However, none of the parties took any step for eight years and assignee of the mortgagor, decree holder, applied to allow him to pay the money and to recover the possession of the property. Such application given by the assignee of the decree holder was treated as an application for extension of time to deposit the mortgage amount and the question was as to whether which Article

of the Limitation Act would apply. Since no specific Article of Limitation Act of 1908 stipulated the time within which such application could be made, it was anticipated before the Bombay High Court that Article 181 being the residuary Article would apply and that such application was required to be made within three years. It may be noted that the plaintiffs obtained the decree before the Bombay High Court on 7th of January, 1907 for redemption of mortgage and he was directed to pay a sum of money within six months and recover possession of the property. The decree further directed that in case of the plaintiff failing to deposit the amount and applying for recovery of possession within the stipulated time, defendants should apply for relief under Section 15-B of the Dekkhan Agriculturists' Relief Act. Unfortunately, neither party took any action and the plaintiffs assigned the right in favour of the third party in 1915 and thereupon the assignee applied on 27th September, 1915 to pay the money which the plaintiff was required to pay and to get the possession of the property under the decree. It was in this fact situation that the Division Bench of the Bombay High Court comprising of Heton J and Pratt,J. deferred and in view of difference of opinion, the matter was referred to the third Judge to decide the question as to whether the application was time barred under Article 181 of the Schedule to the Limitation Act as the application was treated as one for extension of time for the payment of mortgage debt.

9. The matter was thereafter placed before Shah,J. and His Lordship was of the opinion that the application given by the assignee was one to extend time for the payment of mortgage debt and that it would fall under Article 181 of the Limitation Act. The Court took the view that when the decree was passed by the trial court, it was a decree capable of execution and any application to execute, same would be covered by Article 182. If the application given by the assignee in the year 1915 was treated as an application not merely for the extension of time for the payment of the mortgage debt but for the recovery of possession of the property, it is an application for the execution of the decree and as such it was time barred under Article 182. But, since the application was treated as one for extension of time only, it was found that since no limitation for such application was prescribed, Article 181 would apply. Shah, J. thereupon made the following observations:

> "An application for the extension of time for the payment of the mortgage-debt under a redemption decree, if not treated as an application for the

execution of the decree, would clearly fall under Art. 181. It is an application for the exercise of powers referred to in the Code, and there is no other period of limitation prescribed for such an application and the assumption that it is not an application for the execution of the decree. The application would be time-barred, if it were not made within three years from the date on which the right to apply accrued. In the present case the right to apply for the extension of time accrued on the date of the extension of time accrued on the date of the decree or at the latest on the expiry of the period of six months fixed for the payment of the debt under the decree. It is urged that the right to apply for the extension of time accrues from day to day so long as the right to redeem subsists, and that in effect there is no period of limitation applicable to an application for the extension of time. It is further urged that such an application is really an application for a modification and not for the execution of the decree. These contentions have been accepted by my brother Pratt. With great deference I am unable to accept them.

As regards the first contention I do not think that the right to apply can be treated as a right accruing from day to day. The Court has the power to enlarge the time fixed under the decree for the payment of the mortgage debt; but it has no power to enlarge the time prescribed by the Limitation Act. By treating the right to apply for the extension of time as a right accruing from day today, the Court would in effect be allowing the plaintiff to do that indirectly which he could not do directly. That is, though his application for execution is time-barred, he could get over it by applying merely for extension of time long after the execution is time barred. In effect the argument involves the result that there is practically no period of limitation governing the execution of an executable decree, so long as the right to redeem is not extinguished. I am of opinion that an argument involving such a result ought to be negatived."

10. Based on the aforesaid decision of the Bombay High Court, Mr. S.M. Shah, learned Counsel appearing for the Appellants submitted before this court that the

application given by the plaintiffs for drawal of the final decree beyond period of three years was time barred and that no final decree could have been drawn and further that the courts below erred in granting the application of the plaintiffs.

11. From the aforesaid Article it becomes clear that it is a residuary Article providing a period of three years. At this stage it may be noted that Article 181 of the old Limitation Act of 1908 which corresponds in every respect to the present Article 137 applies only to such applications for which no period of limitation was provided elsewhere in the Third Division of Schedule to the Act. The question which is required to be answered as to whether in the present case the application given by the respondents plaintiffs for drawing up a final decree after the Civil Appeal before the Supreme Court against preliminary decree was finally disposed of, can be said to be an application under Section 148 of the Code of Civil Procedure. Firstly, the question which was referred by the Division Bench of the Bombay High Court to the Third Judge was limited only to deciding as to whether such an application can be said to be an application for extension of time under Section 48 of the Code of Civil Procedure. Secondly, before the Bombay High Court, after the preliminary decree was passed and time to deposit the mortgage money was fixed by the trial court, there was no appeal admitted and pending for final hearing. The plaintiff was therefore required to deposit the mortgage amount in the trial court by the time specified in the preliminary decree. Admittedly, he failed to deposit the amount within the specified time. Thirdly, he assigned his right to the third party under the decree and the assignee made an application to decide the mortgage amount beyond the time granted in the preliminary decree. The application was therefore treated by two Judges of the Bombay High Court as an application under Section 48 of the C.P. Code for extension of time to deposit the mortgage amount. Fourthly, it shall have to be kept in mind that in the present case, in the preliminary decree itself, there was a stipulation which provided for fixation of kharajat amount by the trial court and till kharajat amount was determined by the trial court, decree holder cannot be said to be in a position to deposit the decretal amount. Fifthly, the preliminary decree passed by the Assistant Judge did not become final as Second Appeal No. 459 of 1975 was preferred to the High Court and such appeal was admitted. Since the Second Appeal was finally decided by judgment and decree of the learned Single Judge (R.A.

Mehta, J.) on 17th September, 1984 and till then, appeal being continuation of suit, the proceedings can be said to be pending in the Court, final decree could not be drawn. Ordinarily, when appeal against a preliminary decree is preferred, the proceedings of drawing of final decree are not stayed but actual drawal of final decree stayed. From the record of this Second Appeal before this Court it is not known to this court and could not be ascertained from the record available with the court as to whether stay was granted by the High Court against the drawal of final decree since no final decree was drawn till then and no proceedings were intiated by the trial court for fixation of kharajat, it shall have to be assumed that no final decree was permitted to be drawn by the High Court. Sixthly, even the judgment and decree passed by the High Court of Gujarat confirming the preliminary decree passed by the Assistant Judge, was subject matter of further Civil Appeal No.3132 of 1985 to the Supreme Court of India, which was decided by the Supreme Court and preliminary decree passed by the Assistant Judge was confirmed. It shall have to be assumed therefore that till the Supreme Court decided the Civil Appeal preferred to it, the drawal of final decree by the trial court was stayed. Seventhly, in any case the amount of kharajat was yet to be determined and it is clear that after the Supreme Court dismissed the Civil Appeal, the matter was taken up by the trial Court for determining kharajat amount which was determined at Rs. 1200/- and thereafter only the final decree came to be passed by the trial court on 5th of August, 1993. It is thereafter that the plaintiff has applied for drawal of final decree on depositing the kharajat amount and that the court has passed the final decree. Such application was made at Exhibit 77 on 4th of February, 1985 i.e. after the preliminary decree was confirmed by the second appellate court. In fact, in the present case the mortgage amount was deposited by the plaintiffs on 4th February, 1985 i.e. within five months from the date judgment and decree of the learned Assistant Judge was confirmed by High Court in Second Appeal on 17th September, 1984. The plaintiffs have not even waited for the outcome of the Civil Appeal preferred in the Supreme Court by the defendants. The appeal which was preferred before the Supreme Court was decided on 30th September, 1991. The appeal was dismissed and the judgment and decree of the lower courts were confirmed. Much prior thereto, the amount of mortgage money was deposited but the amount of kharajat could not be deposited as the same was not fixed by the trial court. The application made by the plaintiffs therefore cannot be said to be one for extension of time to deposit the mortgage amount, in

substance it is an application to draw the final decree after the appeal was finally decided by the Supreme Court after fixing the kharajat amount. In my opinion, the period of limitation in such case would run from the date the appeal is finally decided by the Supreme Court and thereafter when the amount of kharajat is fixed by the trial court consistent with direction contained in the preliminary decree which was passed by the Assistant Judge. It cannot therefore be said that the application made by the plaintiff was an application for extension of time under Section 148 of the Code of Civil Procedure. In my opinion, it was simply an application for drawal of final decree after the matter was finally decided by the Supreme Court and after the amount of kharajat was fixed. The period of limitation commenced to run from the date the appeal is decided by the Supreme Court and pursuant to preliminary decree amount of kharajat is fixed by the trial court. Thereafter only the final decree is drawn and period of limitation would commence to run from the date the final decree is drawn.

12. In view of the aforesaid distinguishing features, the decision of the Bombay High Court would not apply to the fact situation obtaining before this Court. In my opinion, the lower appellate court was right in holding that the application made by the plaintiffs was not one for extension of time and it was not time barred. It was also right in holding that appeal is the continuation of the suit and since the decree passed by the learned Assistant Judge was subject matter of Second Appeal and further Civil Appeal to the Supreme Court of India, a final decree could not be drawn and even otherwise the amount of kharajat as directed by the preliminary decree could not be fixed. After the Second Appeal in the High Court was decided, the amount of mortgage was already paid by the plaintiffs and he called upon the court to fix the amount of kharajat. As and when the amount of kharajat is fixed, the same is also paid up. It is thus clear that the time begins to run from the date the appeal is finally decided by the Supreme Court and not from the date of the preliminary decree passed by the Court below. In such situation, it cannot be said that after the preliminary decree is confirmed in final appeal, the plaintiff applies for permission to pay up the amount in the court and for direction to deliver possession of the mortgage property to him, he applied for extension of time for payment of mortgage money. In fact, prior thereto, he could not have applied for permission to pay up the mortgage amount and for delivery of possession of the mortgage property as the preliminary decree itself was subject matter of appeal in the High

Court. In the present case, even otherwise, till the amount of kharajat was fixed by the trial court, it was not possible for the plaintiffs to apply for permission to pay the mortgage money into the trial court. On the facts of the case therefore the ratio of the decision of the Bombay High Court in the case of VASUDEV VISHNU (supra) is not applicable.

13. It may be noted that in the present case the suit of the plaintiffs for redemption of mortgage and for possession of the suit property was dismissed by the trial court on 24th November, 1972. It was in appeal being Civil Appeal No. 153 of 1972 that the Assistant Judge allowed the appeal and for the first time passed a preliminary decree. Such decree was passed by the Court of Assistant Judge on 29th of July, 1975, as per which, the suit of the plaintiff was decreed and a preliminary decree for redemption of the mortgage was passed. The plaintiff was directed to deposit the mortgage amount and to deposit the amount of Kharajat as may be fixed by the trial court. Against such judgment and decree passed by the Assistant Judge in Appeal on 29th July, 1975, the Second Appeal was preferred in the High Court of Gujarat being Second Appeal No. 459 of 1975 which also came to be dismissed by the High Court on 17th of September, 1984. The further appeal which was preferred to the Supreme Court of India being Civil Appeal No.3432 of 1985 also came to be dismissed by the Supreme Court and the judgment and preliminary decree of redemption of mortgage passed by the Assistant Judge was confirmed. Much prior to the decision of the Supreme Court, amount of mortgage money was already deposited by the plaintiffs in the trial court immediately after the Second Appeal was dismissed by the High Court in 1984. The trial court was also directed to determine the amount of kharajat after recording evidence. As per the direction of the final court of appeal, the original plaintiffs applied by Exhibit-77 for determination of the amount of kharajat. Prior thereto the amount of Rs. 1133.50 ps being the mortgage amount was already deposited and thereafter on fixation of kharajat amount final decree could be drawn. Thereafter by judgment and order at Exhibit-147, the trial court after recording detailed evidence and framing issues, determined the amount of kharajat at Rs.1200/and called upon the plaintiffs to pay up the amount of kharajat as the amount of Rs. 1133.34ps being the mortgage amount was already paid in 1975. Such order was passed by the trial court simultaneously while granting the application of the plaintiffs and while drawing the final decree under Order 34 Rule 8 of the Code of Civil Procedure. Such order was passed on 4th of August, 1993.

In this fact situation, in my opinion, the lower appellate court was justified in applying the ratio of the decision of the Madras High Court in the case of SUBRAMANIAM v. MUTHIAH, reported in AIR 1959 Madras 189 and the decision of the Orissa High Court in the case of BHAGABAT SIT v. BALARAM SIT, report in 1963 Orissa 61, wherein a view is taken that under order 34 Rule 8, the plaintiff can make payment into Court of all amounts due from him under sub-rule (1) of Rule 7 before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed before the confirmation of the sale held in pursuance of a final decree passed under sub-rule (3) of Rule 8. The period of limitation for the mortgagee to file an application for granting a final decree is three years from the date of the deposit under Art. 181 of the Limitation Act, 1908 equivalent to Article 137 of the Limitation Act, 1963. The mortgagor can make the deposit at any time before the passing of a final decree for foreclosure or sale on good cause shown and upon the terms to be fixed by the Court from time to time. For an application for passing a final decree by a mortgagor the period of limitation is three years from the the date he makes payment into court. In the case before this Court, the deposit was made by the plaintiffs on 26th November, 1984 and the application for drawing a final decree was made at Exhibit-77 on 6th of April, 1985, it cannot therefore be said that the application for final decree was time barred and concurrent judgments of two courts below do not call for any interference of this Court under Section 100 of the Code of Civil Procedure.

14. The third substantial question of law does not arise in this Second Appeal because the lower appellate court has already decided the issue of limitation and the fact that the trial court has not decided such issue would not vitiate the ultimate order passed by the learned District Judge. As regards second substantial question of law which is raised in the memo of this Second Appeal, in my opinion, it does not directly arise in this Appeal. It is the case of the appellants that they were the tenants when the mortgage was executed and therefore even after decree for redemption of mortgage is passed, they were protected under the provisions of the Bombay Rent Act. Ordinarily, when such a contention is not raised before the lower court, I would not have permitted the appellants to raise such a question and would not have decided such a question. However, in my opinion, permitting the appellants to raise such a question, would amount to prolonging the miseries of the

plaintiffs. In fact, in the earlier Second Appeal being Second Appeal No. 459 of 1975 filed before this Court, the present appellants raised a contention that they were the sitting tenants prior to the creation of the mortgage in 1943 and therefore they were entitled to protection under Bombay Rent Act which came into force subsequently. According to the appellants on extinguishment of the mortgage, the tenancy rights would be revived and would survive even after redemption. However, it is to be noted that the mortgage was created in 1940 for a term of 999 years, at that time, there was no tenant in the suit property. Thereafter, if the mortgagee created any tenancy in favour of the father of the present appellant, that would be co-extensive with his right of possession and not beyond that right. Therefore, when a tenant became a sub-mortgagee, his rights of the tenancy or of sub-mortgagee were derived under the mortgagee Khimiji Sunderji and their rights could not be larger or better than the rights of original mortgagee. A decree for redemption of mortgage passed against the mortgagee is binding to the tenants inducted by him and the rights created by him. He cannot create larger rights than the rights he himself has. This question was squarely raised in earlier Second Appeal and the same is concluded by the decision of R.A. Mehta, J. dated 17th September, 1984 in such Second Appeal as well as by the decision of the Full Bench of this Court in the case of LALJI PURSHOTTAM v. THAKKAR MADHAVJI MEGHAJI, reported in 17 GLR 497. In view of the aforesaid settled legal position, the second substantial question of law does not arise as it is squarely answered against the appellants in this very proceeding in earlier Second Appeal as well as it is also covered squarely against the appellants by the decision of the Full Bench of this Court.

15. Since I do not find any substance in any of the substantial questions of law raised, the Second Appeal fails and the same is dismissed.